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IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. 5

PELLEGRINO MILLO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR PETITIONER PELLEGRINO MILLO.

EDWARD G. BURSTEIN
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Bridgeport, Connecticut
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INDEX TO APPENDIX.

	PAGE
nion of Court of Appeals	1a
tutes, Constitutional Provisions and Regulations nvolved	5a
cerpt from Internal Revenue Form 11-C	9a

OPINION OF COURT OF APPEALS

United States Court of Appeals
For The Second Circuit

No. 96 — September Term, 1965

(Argued October 8, 1965
Decided December 15, 1965)

Docket No. 29743

UNITED STATES OF AMERICA,
Appellee,

vs.

PELLEGRINO MILLO,
Appellant.

Before:

Lumbard, Chief Judge
Waterman and Hays, Circuit Judges

Appellant seeks reversal of his conviction after a jury trial in the United States District Court for the District of Connecticut, Timbers, Chief Judge, for having wilfully failed to pay the occupational tax relating to wagers imposed by 26 U.S.C. Sec. 4411 and having wilfully failed to register under 26 U.S.C.

Sec. 4412, in violation of 26 U.S.C. Sec. 7203. Affirmed.

JON O. NEWMAN, United States Attorney for the District of Connecticut, Hartford, Conn., for Appellee.

EDWARD G. BURSTEIN, JEROME GOLDMAN, Bridgeport, Connecticut, for Appellant.

WATERMAN, Circuit Judge:

This appeal is one of several that have arisen out of raids conducted on October 8, 1964 in Bridgeport, Connecticut, upon alleged gambling establishments in that city.

Appellant was arrested in a raid at his restaurant that day. He was found guilty after a jury trial in the United States District Court for the District of Connecicut of having wilfully failed to pay the special gambling occupational tax required by 26 U.S.C. Sec. 4411 and of having wilfully failed to register as required by 26 U.S.C. Sec. 4412, both omissions being in violation of 26 U.S.C. Sec. 7203.

The issues presented upon appeal, all of which were properly preserved below, are: Whether these wagering tax statutes violate one's privilege against self-incrimination guaranteed by the Fifth Amendment; whether the statutes are void for vagueness in that they create a circular scheme of such a nature that one cannot anticipate one's liability to either pay a tax or to register; whether the sentence

of one year's imprisonment and a committed fine of ten thousand dollars on the count charging failure to pay the occupational tax was imposed because the sentencing judge viewed this statute as one directed toward the punishment of gamblers rather than directed toward the raising of revenue; and, lastly, whether there was sufficient evidence introduced at trial by the Government to prove either the defendant's wilfullness or that he was engaged in the business of accepting wagers.

We take up these issues in reverse order. There was sufficient evidence from which the jury could determine that appellant was in the business of accepting wagers and that he wilfully failed to purchase the wagering tax stamp. A special agent of the Internal Revenue Service had placed wagers with appellant on three separate occasions in August, September and October 1964; when the restaurant was raided tally sheets and numbers slips in appellant's handwriting were seized by the raiding officers; and while the raid was being conducted there were telephone calls that the agents answered from persons desiring to place series of bets and who asked for appellant by his nickname. And, too, defendant assured the arresting officers, while stoutly maintaining that he took no bets, that he well knew the wagering tax stamp requirement required of those who were engaged in the wagering business.

The sentence imposed was the maximum provided by Congress in 26 U.S.C. Sec. 7203, so it was proper to impose it; but appellant speculates that remarks made by the sentencing judge on January 11, 1965, two weeks before appellant's trial began, and re-

marks made by him on February 8, 1965, two months and one month, respectively, before appellant was sentenced, not only affected the severity of the sentence but somehow infected the entire case with a federal overreaching in violation of the Fifth and Tenth Amendments into state police prerogatives. Of course, these remarks were not made when appellant was sentenced but we have discussed their impact upon the overall situation in our opinion affirming the conviction of one who was sentenced on January 11, 1965, see **U. S. v. Piccioli,** 2 Cir. October 29, 1965, slip sheets 3335 at 3340-3342.

Likewise we hold that the statute, amended after **United States v. Kahriger,** 345 U.S. 22 (1953), was not beclouded thereby, **U. S. v. Costello, et al,** 2 Cir. October 29, 1965, slip sheets 3319 at 3322-3323 and fn. 1.

We find no merit in either of these two attacks upon the judgment of conviction and the sentence imposed below.

Lastly, we also held in **U. S. v. Costello, supra,** at slip sheets 3324-3325, that as the payment of the tax and disclosure of the occupation is only required of one who of his own volition intends to follow the occupation, the requirements of the statutes do not violate the protection afforded by the Fifth Amendment because one is not compelled to incriminate himself. In so holding we relied upon **Lewis v. United States,** 348 U.S. 419 (1955). If by any chance **Albertson v. Subversive Activities Control Board** —U.S.— 34 U.S.L. Week 4014, November 15, 1965, decided after the present case was briefed and argued and

after our decision in **U. S. v. Costello, supra,** was handed down, has affected **Lewis,** we continue to be bound by the **Lewis** holding. See **United States v. Grassia,** 2 Cir. November 26, 1965.

Affirmed.

STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS INVOLVED.

68A Stat. 525 (1954), 26 U.S.C. Sec. 4401 (1958):

Imposition of tax.

(a) Wagers — There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager — In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed

in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. Sec. 4411 (1958):
Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. Sec. 4412 (1958):
Registration

(a) Requirement. — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax

under subchapter A, the name and place of residence of each such person.

(b) Firm or company — Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information — In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. Sec. 7203 (1958): **Willful failure to file return, supply information or pay tax**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviciton thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U.S.C. Sec. 6011 (1958): **General requirement of return, statement, or list**

(a) General rule — When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

26 C. F. R. Sec. 44.4412-1 (B) (2): **Registration**

"(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see Sec. 44.4905-2.

EXCERPT FROM INTERNAL REVENUE FORM 11-C

. . . "Are you engaged in the business of accepting wagers on your own account?" . . .

. . . "Do you receive wagers for or on behalf of some other person or persons?" . . .